

BEFORE THE FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

In the Matter of )

) MUR 4788

California Democratic Party *et al* )

2000 APR 18 A 11:40

**SENSITIVE**

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED: Authorize the issuance of

a second subpoena to

produce documents and order to submit written answers to the Friends of Lois Capps and David Powdrell, as treasurer.

II. BACKGROUND AND LEGAL DEVELOPMENTS

On June 22, 1999, the Federal Election Commission (the "Commission") found reason to believe that: the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441a(a)(2)(A), 441d(a), 441a(d), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i); and the Friends of Lois Capps and David Powdrell, as treasurer, ("Capps Committee") violated 2 U.S.C. §§ 441a(f) and 434(b).<sup>1</sup> Simultaneously, the Commission approved Subpoenas to Produce Documents and Orders to Provide Written Answers ("Subpoenas") to the respondents. The findings were based on information from the Complaint and responses showing or suggesting that mailings paid for

<sup>1</sup> The Commission also determined to take no action at this time regarding a violation of 2 U.S.C. § 441b, by the Friends of Lois Capps and David Powdrell, as treasurer.

by the California Democratic Party (collectively "CDP") from its federal and non-federal accounts were not generic party activity as reported by the CDP, but were communications containing express advocacy of a clearly identified federal candidate—Lois Capps. In light of the above, the Commission made findings that disbursements for the mailings were for the purpose of influencing a federal election resulting in either prohibited independent expenditures by the CDP or prohibited in-kind contributions from the CDP to the Capps Committee through coordinated expenditures.

Notifications of the Commission's findings and the Subpoenas were mailed to the respondents on July 7, 1999. Both respondents requested a 30-day extension to reply to the Subpoenas. Attachments 1-2. The CDP was granted the extension and submitted responses and documents on September 1, 14, and 15, 1999. Attachment 3. The Capps Committee, however, was informed that this Office would not grant the extension because the Committee did not provide assurances that it would fully comply with its subpoena.<sup>2</sup> Attachment 4. The Capps Committee, however, ignored the fact that it had not been granted the extension and submitted its response well past the due date, on September 15, 1999. Attachment 5.

In its subpoena responses, the CDP raised objections to the scope of questions 1, 5b, 6b and 6c, providing only partial answers to these questions. By letter dated November 23, 1999, this Office informed the CDP that their answers were incomplete and requested that they fully comply. Attachment 6. By letter dated December 14, 1999, the CDP declined to supplement their answers. Attachment 7.

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<sup>2</sup> In addition to submitting late subpoena responses, counsel for the Capps Committee did not submit a designation of counsel until September 16, 1999, several months after the notification letters were mailed and after this Office had made several phone calls and sent letters to counsel.

After the Commission had made reason to believe findings in this matter, there were significant developments regarding the legal standards for coordination. On August 2, 1999, the United States District Court for the District of Columbia issued its opinion in FEC v. Christian Coalition, 52 F. Supp.2d 45 (D.D.C. 1999), and on September 22, 1999, the Commission decided not to appeal.<sup>3</sup>

In the Christian Coalition decision, the court rejected the assertion that “express advocacy” was required for expenditures to be considered coordinated. Christian Coalition, 52 F. Supp.2d at 87. The district court stated that “importing the ‘express advocacy’ standard into § 441b’s contribution prohibition would misread Buckley and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government’s compelling interest in preventing real and perceived corruption that can flow from large campaign contributions.” Id. at 88.

The court went on to discuss two general ways in which coordination could occur. First, it found that “expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent” would be considered coordinated, holding that this portion of the FEC’s approach [taken from Section 431(17) of the statute] was “narrowly tailored.” Id. at 91. The court reasoned that the “fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act’s prohibition on contributions.” Id. at 92.

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<sup>3</sup> The Christian Coalition decision addressed coordination in a case dealing with an organization that was not a party committee. While the Commission is involved in a rulemaking looking towards adopting, in some form, the Christian Coalition standard for coordination, it has left open the question as to whether the same coordination standard will apply to party committees.

Second, the court ruled that absent a request or suggestion, “an expressive expenditure becomes ‘coordinated;’ where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication’s: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) ‘volume’ (e.g., number of copies of printed materials or frequency of media spots).” *Id.*<sup>4</sup>

The court also discussed what it termed the “ ‘insider trading’ or conspiracy standard” of coordination. Specifically, the court addressed to what extent contacts or ties between an expender and a campaign, such as the fact that an individual worked for the expender and the campaign and was privy to non-public information, give rise to an inference that there was coordination with respect to the expressive expenditures by the expender. *Id.* at 89-97. The court found that such contacts or ties alone would not be sufficient to establish coordination unless there was also evidence of “discussion or negotiation” regarding the expenditures. The court also found that coordination might be established if an individual had a certain level of decision-making authority for both the spender and the campaign and the spender made the expressive expenditures to assist the campaign. *Id.* at 96-97.

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<sup>4</sup> Two other recent district court decisions addressed coordination issues. In FEC v. Public Citizen, Inc. et al., Civ. Action No. 1:97-cv-358-RWS (N.D. Ga. September 15, 1999), the court found, among other things, that the communications between the independent spender and the candidate “did not rise to the level of consultation or coordination between the parties.” *Id.* at 16. The Commission did not include the coordination issue in its appeal of the Public Citizen decision.

In FEC v. Freedom’s Heritage Forum, Civ. Action No. 3:98cv-549-S (W.D. Ky. February 4, 2000), the court recently allowed the Commission to amend its complaint in that action to include language alleging that campaign information had been provided “with a view toward having an expenditure made,” language which the court previously found to be the touchstone for an adequate allegation of coordination.

In devising its legal standard for coordination, the Court drew a distinction between “‘expressive,’ ‘communicative’ or ‘speech-laden’ coordinated expenditures” at issue in that case, which are subject to the highest form of First Amendment protection, from “non-communicative materials” and from situations in which the spender finances materials for a candidate’s campaign. *Id.* at 85 n.45. The court made explicit that its standard only applied to expressive coordinated expenditures. *Id.* at 91.

Finally, the court recognized that discovery in coordination cases is “a necessarily fact-intensive inquiry allowing for extensive FEC inquiry into the nature and extent of communications between the alleged contributor and the campaign.” *Id.* at 88.

In light of the Commission’s apparent adoption of the Christian Coalition standards, this Report analyzes the information at hand in this matter according to those standards. It summarizes the responses to the Commission’s findings and the information thus far provided in the subpoena responses, and discusses what further investigation is necessary to determine whether coordination occurred. Indeed, as explained below, given the Christian Coalition’s emphasis on the importance of evidence of discussion and negotiation regarding expenditures to establish coordination—this Office believes a more in-depth investigation of the nature and extent of communications among the parties is necessary in this matter.

#### **IV. RESPONSES TO FINDINGS AND SUPBOENAS**

##### **A. Capps Committee**

The Capps Committee’s subpoena responses consist of an affidavit from Cathy Duvall, the campaign manager for Lois Capps’ 1998 special election, and responses to the subpoena questions signed by Ms. Duvall for the Capps Committee.

In its subpoena response, the Capps Committee denies any coordination with the CDP regarding the communications at issue, stating “unequivocally that it did not coordinate, in any way, the mailings at issue in this case” and requesting that the Commission dismiss it from this matter. Attachment 5, pages 1-2.

In her affidavit, Ms. Duvall states that, as campaign manager, she “had primary responsibility for devising and overseeing all aspects of the Capps Committee’s campaign strategy. . . and also had responsibility for communicating, on behalf of the campaign, with third-party groups such as the California Democratic Party.” Id. at 3. Referencing the CDP mailings discussed in the Factual and Legal Analysis, Ms. Duvall avers that “[t]he Capps Committee did not coordinate, in any way, with the California Democratic Party regarding these mailings . . . was not involved in the preparation, planning, or targeting of these mailings in any way, [and] that these mailings were not prepared or distributed at the urging, suggestion, or direction of the Capps Committee.” Id. at 3-4. Ms. Duvall further avers that when she “learned of the mailings, it was [her] . . . opinion that they were ill-advised and would not likely help Lois Capps win the election.” Id.

In its subpoena responses, the Capps Committee describes communications between the Capps Committee and the CDP as “limited,” involving a few conversations between Ms. Duvall and Kathy Bohler and Robert Mulholland of the CDP on matters other than the communications at issue. Id. at 6. According to the Capps Committee, one conversation with Mr. Mulholland took place before Lois Capps became a candidate and dealt with “the timeline and process for becoming a candidate in a special election.” Id. The other conversation occurred during the primary and dealt with speculation as to who would be the likely Republican Party nominee. Id. The Capps Committee, however, avers that the conversation during the primary “did not include

any discussion of campaign strategy.” Id. The Capps Committee describes the conversation with Ms. Bohler as regarding “the filing requirements and other technical issues related to qualifying for candidacy in the special election.” Id.

The Capps Committee did not produce any documents in response to the subpoena, stating that “there may have been documents related to the discussion Ms. Duvall had regarding the process for becoming a candidate and running in a special election . . . [but that] . . . the Capps Committee has been unable to locate in its possession any such document . . . [and] [t]he Capps Committee does not have any documents responsive to this request.” Id. at 6-7. Finally, the Capps Committee responded in the negative to questions asking whether they had retained the vendors Armando Gutierrez & Associates Inc. and Crounse & Malchow, the two vendors retained by the CDP to work on the communications at issue. Id. at 7-8

#### **B. California Democratic Party**

The CDP subpoena responses were provided by Kathy Bowler, the CDP’s Executive Director, and include a supplemental document entitled “Legal Argument,” which addresses the issue of express advocacy; communications paid for and produced by the CDP for the 1998 special election (five mail pieces and scripts and audiotapes of the two radio spots);<sup>5</sup> financial documentation (including copies of invoices and checks related to expenditures to vendor

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<sup>5</sup> Each of the five mail pieces has a different theme (“Healthcare”, “Education A”, “Education B”, “Respect”, and “Capps tradition”). Two of the mail pieces include Spanish phrases. All the mail pieces contain multiple references to Walter Capps and the statements “Continue the Walter Capps Tradition,” “Vote Democratic” and “Special Election, Tuesday, March 10<sup>th</sup>” One of the mail pieces also includes photographs of and a quote from the late Walter Capps. The two radio spots—one in Spanish and the other in Spanish/English-Bilingual—contain the same exhortations and multiple references to Walter Capps as in the mail pieces but also include statements telling “voters of the 22<sup>nd</sup> congressional district” that “on March 10<sup>th</sup> there will be a special election to fill the seat of recently deceased democrat Walter Capps.” The radio spots ran from February 28, 1998 through the day of the election on March 10, 1998. The mail pieces and radio spots (scripts/audiotapes) are available in OGC Docket.

Armando Gutierrez & Associates for the radio spots and to vendor Crounse & Malchow for the mail pieces);<sup>6</sup> and a copy of the \$5,000 contribution check to Lois Capps for Congress); a copy of the assignment of the CDP's coordinated party expenditure authority to the Democratic Congressional Campaign Committee (DCCC)(Attachment 8); and, a copy of the CDP Endorsement Procedures for the 22<sup>nd</sup> Congressional District. Attachment 9.

In its subpoena responses, the CDP argues, as it does in its previous response, that the communications at issue are generic voter activity rather than candidate-specific because they do not mention the Democratic candidate Lois Capps or expressly advocate her election.<sup>7</sup> The CDP also denies any coordination occurred with the Capps Committee regarding the communications

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<sup>6</sup> The financial information produced reflects the CDP paid a total of \$99,079.06 for the mail pieces and radio spots, of which \$86,250 was disbursed to Crounse & Malchow for the mailings and \$12,829.06 was disbursed to Armando Gutierrez & Associates for the radio spots. The amounts match those reported in the CDP disclosure reports as disbursements for generic voter activity. The financial information is available in OGC Docket.

<sup>7</sup> In its latest response, the CDP makes similar arguments as in its previous response, in support of its position that the communications at issue are not express advocacy of a clearly identified candidate. Compare Attachment 3, pages 14-17 with FGCR, dated May 6, 1999, pages 11-14. Because these arguments are similar to those raised in the CDP's previous response and were dealt with in the First General Counsel's Report, they will not be readdressed in this Report.

In reciting its arguments that the communications at issue were not candidate-specific because they were not "unambiguous" and were context-driven, the CDP also cited to Christian Coalition, arguing that: "[l]ike the Ralph Reed speech in *FEC v. Christian Coalition*, this communication "requires one inferential step too many to be unequivocally considered an explicit directive;" "rather than focusing on the language of the communication, the Commission conclusion here is completely context-driven [because] the identical communication with another election date would unquestionably be characterized as generic activity;" and the Commission's "subjective analysis" has been "rejected by courts" and "impermissibly restricts CDP's right to communicate with the general public in the case of special elections." Attachment 3, pages 15-16.

The CDP also argues that the Commission has not explained why the terms "specific candidate" and "clearly identified candidate" are related or why the allocation regulations use the former term in some places and the latter in others. *Id.* at 15 n.1. In the FGCR, page 14, we stated that given the definition of clearly identified candidate, there was no basis to differentiate between the terms "specific candidate" and "clearly identified candidate." The Explanation and Justification to the allocation regulations at 55 Fed. Reg. 26064 (June 26, 1990) do not address the use of these terms.



at issue. Thus, the CDP argues, as the communications were not coordinated and the disbursements were for generic voter activity it has not violated any provisions of the Act.<sup>8</sup> The CDP's responses regarding coordination are discussed below.

### **Coordination**

In its subpoena responses, the CDP denies any coordination with the Capps Committee regarding the mailings, arguing that the communications “ ‘were made without cooperation or consultation’ with Lois Capps or the Capps campaign committee . . . and were not made ‘in concert with, or at the request or suggestion of’ Lois Capps or the Capps committee.” Attachment 3, page 18. Specifically, the CDP avers that “there was no communication between the CDP and the Capps campaign, or anyone acting on behalf of the campaign about these communications, either before or after the communications.” *Id.* Finally, the CDP avers that it is “aware of no communications with the Capps campaign about the design or content of the direct mail or radio spots, no communications about the timing of those activities, and no communications about these activities after the fact.” *Id.* at 4.

The CDP, however, also avers that “there was no communication generally between the CDP and the Capps campaign except some possible contact incidental to the endorsement process and contact on election day about possible wrongdoing by precinct workers in the district.” *Id.* at 18. The subpoena responses describes these contacts with the Capps campaign

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<sup>8</sup> The CDP also argues in a footnote that the Factual and Legal Analysis does not support a Section 441b finding because the CDP is not a corporation, labor union, or national bank. Attachment 3, 17 n.2. As we discussed in the FGCR, page 17, and in the Factual and Legal Analysis, this finding is based on the fact that in 1998 California allowed corporations and labor organizations to contribute to a political party, suggesting that the CDP's non-federal funds used to finance the communications most likely included funds from corporate and labor sources.

as: (1) discussions between Bob Mulholland and the Capps campaign on the day of the general election regarding problems with precinct workers; and (2) a state convention held after the special general election on March 20-22, 1999, to which, the CDP states, Lois Capps was “probably” invited to speak. *Id.* at 4-5. The response states that “[d]iscussion about the campaign and election undoubtedly took place at the convention, ... but CDP has no knowledge of particular conversations concerning the activities which are the subject of this complaint.” *Id.* at 4-5. The response also states that “[t]he only document which may have gone to someone in the Capps campaign was a notice of the date of the endorsement meeting and a description of the endorsement procedures.”<sup>9</sup> *Id.* at 4-5. Interestingly, the CDP’s description of contacts with the Capps Committee makes no mention of the conversations Ms. Duvall of the Capps campaign reported having with the two officials of the CDP—Mulholland and Bohler—regarding the procedures for running in the special election.

The CDP also provided financial information regarding the disbursements to the two vendors (Crounse & Malchow and Armando Gutierrez & Associates) used to prepare the mail pieces and radio spots and discussed communications with these vendors. None of the information provided, however, raised any issues of coordination such as, any overlap of consultants/vendors with the Capps Committee.

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<sup>9</sup> The CDP states that copies of their endorsement procedures were sent to all members of the Democratic State Central Committee in the 22<sup>nd</sup> district at that time and that it was “possible that a letter with the same information was sent to the Capps campaign as a possible candidate, although CDP has no copy of such contact.” Attachment 3, page 7. The CDP further states that it chooses the date of the meeting and sends out the notice but that the meetings are run by local volunteers and that Bob Handy, the volunteer regional director, convened the December 7, 1997, meeting in the 22<sup>nd</sup> district. *Id.* The CDP’s copy of the endorsement procedures contains a general description of the CDP’s rules governing endorsement procedures. Attachment 9.

Finally, the CDP provided a letter of agreement from the Democratic Congressional Campaign Committee (DCCC) to the CDP, dated December 11, 1997, signed by both parties and reflecting that the CDP had assigned the bulk of its coordinated party limits (up to \$31,800) to the Democratic Congressional Campaign Committee (DCCC), for purposes of making Section 441a(d) expenditures on behalf of the 1998 special congressional election in the 22<sup>nd</sup> District of California. Attachment 8.

### III. CDP OBJECTIONS

The CDP has refused to fully answer the subpoena questions seeking information about communications the CDP may have had with any persons about the 1998 special election campaign of Lois Capps. Specifically, in responses to subpoena questions 1, 5b, 6b, and 6c, the CDP objected to the disclosure of information about communications with parties other than the Capps Committee or the vendors on the basis that “such communications are not relevant to whether the activities of CDP in the special election were generic voter activity or related to a clearly identified candidate . . . [or to] whether the expenditures were independent or coordinated.” Attachment 3, pages 3, 5, 9, and 11-12. The CDP has also asserted that “any inquiry into CDP’s communications with persons other than [*sic*] directly relevant to the allegations of this Complaint” would be “an impermissible burden on CDP’s First Amendment rights of speech and association.” *Id.* at 5.

In response, this Office pointed out that in investigating a coordination matter, questions about communications between the expender and persons other than the candidate committee or vendors are also highly relevant and/or could lead to the discovery of relevant evidence given that information about such communications might reveal, for example, that a third party was the vehicle through which coordination between the expender and the candidate committee took

place. Attachment 6. Although the CDP was directed to provide complete answers to the questions, it reiterated its previous objection and declined to supplement its responses.

Attachment 7.

#### IV. DISCOVERY

Despite the Capps Committee's and the CDP's clear assertions that there was no coordination and only minimal contacts between them,<sup>10</sup> the CDP's refusal to respond to questions regarding communications with third parties and the lack of information regarding the Capps Committee's communications with other than the CDP and the two vendors raise questions about these assertions and prevent an accurate assessment of whether there was coordination between the CDP and the Capps campaign.

As discussed earlier, the Christian Coalition court made clear that coordination involves more than "mere inquiry" between the campaign and the expender. Christian Coalition, 52 F. Supp.2d at 93. If the campaign or candidate requests or suggests to the expender that the expenditure be made, then the expenditure is deemed to be coordinated and is an in-kind contribution. Id. at 92. If there is no direct request or suggestion by the candidate or campaign, then there must be "some to-and-fro" between the expender and the candidate or his agent. In other words, the candidate, his agent or campaign must exercise control over or have had substantial discussion or negotiation with the expender over the communication's contents, timing, location/mode/intended audience, or volume. Id. at 92, 93. The campaign and the expender emerge as "partners" in the communications, although not necessarily equal partners. Id. at 92. This interest by the campaign demonstrates that the expenditure has value to it. Id.

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<sup>10</sup> Although the Capps Committee's description of contacts with the CDP regarding procedures for running in the special election and the discussion during the primary were not mentioned by the CDP, the CDP did acknowledge contact (sending of the CDP Endorsement Procedures) with the Capps Campaign.

The standard set forth in Christian Coalition is a restrictive one. Id. at 88. Although the evidence collected thus far in this matter does not demonstrate there was coordination between the CDP and the Capps campaign under a Christian Coalition standard, it does raise further points for investigation. This Office believes that the Christian Coalition decision—emphasizing the importance of evidence of discussion and negotiation regarding expenditures to establish coordination—requires a more in-depth investigation of the nature and extent of communications among the parties in this matter.

As a threshold matter, the CDP has refused to respond to the parts of the subpoena concerning contacts and communications with third parties other than the Capps Committee and the two vendors. In addition, the Capps Committee subpoena did not include questions about contacts with parties other than the vendors and the CDP. Because there has been no evidence thus far collected with respect to coordination between the CDP and the Capps Committee through a third party intermediary, questions regarding such contacts might produce important clues on the issue of coordination.

There are two possible ways the mail pieces and radio spots could have been coordinated: (1) direct coordination between the CDP and the Capps campaign; and (2) coordination between the CDP and the Capps campaign facilitated by a third party. Although the subpoena responses at face value appear to rule out direct coordination between the CDP and the Capps campaign, they do raise questions about coordination through a third party.

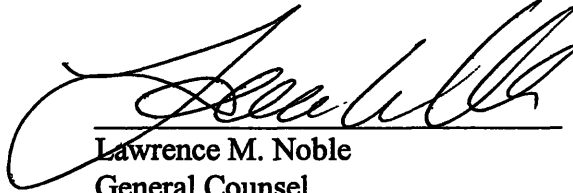
In light of the above, this Office recommends that the Commission authorize a second subpoena and order to submit written answers to follow-up questions to the Friends of Lois Capps and David Powdrell, as treasurer

This Office also recommends that the Commission deny the request by the Friends of Lois Capps and David Powdrell, as treasurer, for a dismissal. Finally, based on the results of this round of subpoenas the Office might later recommend that the Commission authorize the depositions of certain individuals.

## V. RECOMMENDATIONS

1. Deny the request by the Friends of the Lois Capps and David Powdrell, as treasurer, to dismiss it from this matter.
2. Approve subpoenas for documents and orders for written answers.
3. Approve the appropriate letters.

4/17/00  
Date

  
Lawrence M. Noble  
General Counsel

### Attachments

1. California Democratic Party Request for Extension.
2. Friends of Lois Capps Request for Extension.
3. California Democratic Party Response to Commission Subpoena.
4. OGC Letter to Friends of Lois Capps.
5. Friends of Lois Capps Response to Commission Subpoena.
6. OGC Letter to California Democratic Party.
7. California Democratic Party Response to OGC.
8. Assignment Letter from the Democratic Congressional Campaign Committee to the California Democratic Party.
9. 22<sup>nd</sup> Congressional District Special Election—CDP Endorsement Procedures.

Staff assigned: Dominique Dillenseger